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Chapter 1
On the Theory of Juridic Fictions. With Special Consideration of Vaihinger's Philosophy of the As-If

Hans Kelsen and Christoph Kletzer

Abstract This is a translation into English of Kelsen, Hans. 1919. Zur Theorie der Juristischen Fiktonen: Mit besonders Berücksichtigung von Vaihingers Philosophie des Als Ob, *Annalen der Philosophie* 1: 630–658.

1.1 Content

AQ1

I. The notion of a fiction and the object of cognition in legal science. The opposition to "reality". The actuality of nature and the actuality of the law. The extension of Vaihinger's concept of a fiction. True fictions of legal *theory*. The legal subject.

II. The so-called "fictions" of legal *practice*. The pseudo-fictions of the legislator. Their fundamental difference from epistemological fictions; the absence of a cognitive aim and the absence of an opposition to the actuality of nature or the actuality of the law. Article 347 of the German Commercial Code. The praesumptio iuris. The praetorian fictions.

III. "Fictions" in the application of the law. The analogy. Its uncorrectable conflict with the actuality of the law and its juristic inadmissibility. The legally required analogy.

IV. Legal theory and legal practice. The moral fiction of "freedom". Its dispensability in the case of a dissolution of the faulty syncretism of the perspectives of is and ought. The fiction of the "social contract" establishing the state. Its dispensability for legal positivism.

V. The sovereignty of the legal order. The independence of law from morality. The allegedly fictitious character of this separation. Vaihinger's "practical" fictions. The legal norm and legal duty are not fictions.

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1.2 I

A considerable part of Vaihinger's notable theory of fictions has been developed by reference to the so called "juridic" fictions. As a matter of fact, Vaihinger understood juridic fictions to a paradigmatic case of fictions. For him, apart from mathematics, there was hardly another field better suited to the deduction of logical laws, to the illustration or development of logical methods in general, and of the method of the fiction in particular, than the law. He further expressed his regret about the fact that logicians have so far neglected the juridic fiction since they did not see that logic has to take its subject material from an actually living science.[1] For Vaihinger the juridic fictions are "scientific" fictions[2] and they do not in principle differ from epistemological fictions.[3] He explicitly stresses "the formal identity of the actions of understanding and of the whole intellectual state in juridic fictions with all the other scientific fictions".[4]

However, the notion of a "juridic fiction" captures quite a broad variety of phenomena: only a relatively small part of them can be seen as fictions in the actual sense of this term, i.e. as fictions according to Vaihinger's own definition. After all, most of the phenomena which Vaihinger himself treated as "juridic fictions" and which he uses to lay the foundations of his meritorious theory, are no fictions at all; at least they do not serve as examples of the intellectual constructs, to which the very qualities apply which he so fittingly describes. Thus, even though we have to unreservedly agree with the main results of Vaihinger's philosophy of the As-If, it is especially in relation to the juridic fictions, i.e. in relation to the kind of fictions Vaihinger prefers to use, that the arguments have to be seen to be unconvincing.

According to Vaihinger a fiction is characterised both by its end and by the means through which this end is reached. The end is the cognition of the actual world; the means, however, is a fabrication, a contradiction, a sleight of hand, a detour and passage of thought. It might be a somewhat odd means, the fiction is nevertheless a means that logic uses; it has epistemological character and has its relevance as an instrument of cognition.[5]

It is the cognition of *actual reality* which the fiction serves. "The conscious turning away from actual reality is meant to prepare the cognition of the latter."[6] And the opposition to actual reality is one of the principal characteristics of the fiction.[7]

Now, it has to appear doubtful from the very beginning whether in the natural sciences we could ever come across fictions which do not in their essence aim at the cognition of actual reality. If we take a fiction to be an—admittedly somewhat

[1] Vaihinger (1913, p. 46).
[2] Ibid 257.
[3] Ibid 447.
[4] Ibid 250.
[5] Ibid 175 ff and passim.
[6] Ibid. 27.
[7] Ibid 171 ff.

odd—means to grasp actual reality, then only a view of legal science which has completely strayed off its usual ways could make use of a fiction in this sense, and accordingly a fiction in this sense could never yield legal scientific cognition, not even in an indirect sense, via a detour. If by means of a fiction we claim the actuality of something (and be that in contradiction to actuality itself), then in a scientific endeavour which does not even attempt the cognition of something existing in actual reality, a fiction can only ever be an illegitimate and completely useless, viz. only harmful error.

As a matter of fact, Vaihinger was himself well aware of the true nature of legal science! He repeatedly stresses that the task of legal science is not to gather knowledge of something that exists in actual reality. "So far the only truly scientific fiction we talked about was the juridic fiction; however, it needs to be stressed that legal science is not actually an empirical science, a science that deals with what actually exists, but a science that deals with human, arbitrary institutions."[8] Legal science aims at the knowledge of an *ought*; calling this object"human arbitrary institutions" is not entirely correct, since human arbitrary institutions, too, are something actual and can be objects of an empirical science, e.g. of sociology.

However, no grave objection to Vaihinger's theory of fictions emerges from all of this. What emerges is only a significant modification. After all, legal science does indeed make use of fictions. We will demonstrate below, what kind of fictions these are and that most of Vaihinger's "juridic fictions" are not true fictions at all. All that needs to be said here is that Vaihinger's concept of a fiction becomes too narrow, as soon as one allows only empirical reality to be the object, the only target or product of cognition. And insofar as one wants to accept as sciences also those sciences which are not natural sciences, such as, for instance, ethics and, in particular, legal science, then such a restrictive understanding of fictions cannot be accepted. A thus appropriately expanded concept of a fiction emerges, as soon as we replace "actual reality" as the specific object of cognition with this "object of cognition" itself, understood in general terms. And we have to speak of a fiction as soon as cognition (and especially juridic cognition) takes a detour in knowing its object (and in juridic knowledge this object is the law, the legal order, the legal ought), a detour in which it consciously sets itself in contradiction to this object; and be it only in order to better grasp it: just like a rock-climber, in order to avoid an obstacle and reach his goal more easily, is sometimes forced to temporarily climb downwards, i.e. in a direction directly opposed to his goal, the peak.

It is in this sense that there are true, i.e. epistemological fictions in legal science. They are fictions of the attempt to know the law, fictions of the intellectual mastery of the legal order. They are fictions of *legal theory*. Such a fiction, an auxiliary concept, an auxiliary construct, is, for instance, the concept of a legal subject or the concept of a subjective right.

In this context we do not need to fully investigate the concept of a legal subject or a person in all its facets. What should suffice is to show how fruitful the application of Vaihinger's philosophy of the As-If to the fictions of *legal theory* can be.

[8] Ibid 257.

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In the common juristic understanding a person—and be it the physical person or the legal person—exists as an object distinct and independent from the legal order. We usually call this objectthe "bearer" of duties and rights and attribute to it more or less actual existence in the real world. Whether one wants to limit this kind of independent existence to the physical person or wants to extend it also to the so called legal person (like the organic theory wants to do) does not matter here. What suffices is to note the marked tendency to posit the person as something that exists in actual reality.

Now, if the physical as well as the legal subject can be shown to be nothing but the *personification of a complex of norms*[9] for the purposes of simplification and illustration—something which cannot be comprehensively demonstrated in this article—then the idea of a person, which is commonplace in legal theory, would be a typical example of a fiction; and Vaihinger has to be credited with making the interesting and complex thought-mechanism of the latter transparent. It is an intellectual construct which aims at capturing the object of legal science, i.e. the legal order, yet is nevertheless itself merely a product of imagination and is in thought *added to the object of cognition.* It is thus somehow a duplication of the object and a distortion of cognition. By that, this mere aid-to-thinking sets itself in direct opposition to the object, i.e. to the specific legal reality, and becomes in itself contradictory, just like any analysis of the concept of the person would reveal. Now, if the person (which was originally only set up as a specific aid-to-thinking, as a mere framework aimed at grasping the legal order) is posited to be an actually existing thing, i.e. as a kind of natural object, then a thus enhanced fiction does indeed involve an opposition to actual reality, which can only be possible in the transgression of a legal theory, thus in a theory that claims to have natural facts as its objects.

The concept of a legal subject is primarily a kind of fiction which Vaihinger calls a "personifying fiction". They emerge from our tendency to anthropomorphically personify intellectual constructs, a tendency which has forever dominated our intellectual capacities, and which forms this "undying inclination of man[10] to hypostasise everything which is purely intellectual into the shape of a person or subject and to thus make it intelligible. "The common principle is the hypostasis of phenomena in some respect, irrespective of how far the hypostasis aligns itself with this image of the person. This image of the person is also the truly determining factor in the category of the thing."[11] "The basic scheme of substantiality is, after all, personality."[12] This does indeed apply to the personifications of the law (i.e. of the legal norm), and it is in this way that we have to understand the legal subject. The legal norm, i.e. the fact that certain human behaviour ought to be a certain way, presents itself as the hypostasis of this purely intellectual object. And the insight that the concept

[9] In the case of the personification of the legal order as a whole we arrive at the so-called person of the state and in the case of the personification of individual legal order we arrive at the physical or legal person.

[10] Ibid 391.

[11] Ibid 50.

[12] Ibid 391.

of a thing is also a personifying fiction lets the legal subject and the subjective right, which are somehow understood as "things" appear to be quite similar, if not identical hypostases of the "objective" legal norm. It cannot be stressed enough that the concept of the legal subject has the same logical structure as the most characteristic form of personifying fiction, i.e. of the concept of the soul, or the concept of force,[13] the logical untenability of which does not militate against its actual practicability. It would certainly be a worthwhile endeavour to try to understand the legal person as a kind of *legal soul*. And it is by no means moot to clarify that the concepts of ethical personhood and of the "conscience", too, are illustration-serving personifications of a norm, namely the moral norm. Vaihinger very appropriately characterises this *duplication* of the object of cognition which is effected in the fiction in general, and in the personification in particular, and one could not describe this strange duplication of the law, this tautology, which can be found in the legal subject, better than with the words of Vaihinger, who in this passage did not intend to capture the legal concept of the person, but the concept of a force: "It was especially the seventeenth century which has created many of these concepts in its sciences;[14] it was believed that by means of these concepts one has actually understood something; however, such words are but shells, which are supposed to hold together and contain a material nucleus. And just as the shell in all its forms traces the nucleus and in duplicating the latter simply represents it externally, so these words or concepts are but tautologies, which simply repeat the actual thing in external clothing."[15]

The contradictions, which are posited in the notion of a legal subject, which claims to be a thing distinct from the legal norm (of the "objective law"), but which is just the latter's repetition, these contradictions may not be resolved, but they at least become transparent to us as soon as we accept (after Vaihinger has told us), that it lies within the nature of fictions to entangle us in contradictions. "By its very own doing thought leads us onto certain pseudo-concepts just as seeing leads us into unavoidable optical illusions. As soon as we recognise this optical semblance as being necessary, as soon as we consciously accept the fictions created by it (e.g. God, freedom etc.) and also see through them we can bear the ensuing logical contradictions as necessary products of our thought and reach the insight that they are the necessary consequences of the inner mechanism of the thinking organ itself."[16]

This is why the fiction of the legal subject, which is in itself contradictory, can nevertheless be accepted without harm to legal science, since it has the advantages of *illustration* and *simplification*. This, however, is true only as long as and insofar as one remains aware of its fictitious character and of the duplication which is effected by means of the concept of the person. Until then we can dispense of what Vaihinger calls the *correction* of the fiction. "Insofar as the fiction presents an opposition to actual reality, it can only have value if it is employed *provisionally*. This

[13] Ibid 50.

[14] It has to be noted here, that Schloßmann (1906) also traces the concept of the legal person back to the systematic of the seventeenth century.

[15] Ibid 52.

[16] Ibid 223.

is why … it needs to be corrected."[17] "The mistake has to be reversed by simply discharging of the construct which was fictitiously introduced."[18] Vaihinger expressly states: "Such a correction does not seem to be necessary for juridic fictions; and it indeed is not necessary. Since here we are not dealing with an exact estimation of something actual, but with a subsumption under an arbitrary law, a man-made construct, not a natural law, not a natural relation.a[19] However, Vaihinger thereby does not really refer to the kind of fictions which are found in the legal concept of a person. The latter concept is created by legal science, by legal theory or the cognition of law. This is not the case with thewith the "juridic" fictions employed by the legislator or someone applying the law. However, it is to these that Vaihinger mainly refers even though they are intellectual constructs which do not serve cognition and are thus not fictions in the *logical* sense. Still, Vaihinger's comments pertain precisely to the fiction of the legal subject employed by *legal theory*. However, by claiming that in legal science we do not intend to capture an actual reality he has characterised the essence of legal science as opposed to natural science only in a negative sense. Put positively, legal science intends to comprehend an ought, it intends the cognition of norms.

The concept of the legal person can be employed with benefit as long as it is understood in accordance to its own logical structure, i.e. as a mirror image. However, this concept has not been able to avoid the danger that comes with any personification: its hypostatisation into an actual object of nature. Insofar as theory takes a mere mirror image as an actual thing, it stretches the contradiction—one by which the law as subject (i.e. the legal subject) already stands, in and of itself and before any position of actuality exists, against the law as object (i.e. the objective law)—to a contradiction against actuality. In the concept of a legal person a natural thing is claimed to exist, which never and nowhere exists in actual reality. This is true both for the contradictione contradic concept has not been a Vaihinger aptly compares the fictitious constructs of thought with ere exists in actual reality. This is true both for the "physical" and for the so-called "legal" person. Vaihinger aptly compares the fictitious constructs of thought with "knots and nodes" which thought ties into the threads presented to it, "knots and nodes … which provide ancillary service to thought, which, however, become pitfalls for thought, as soon as the knot is taken as something that is contained in experience itself."[20] It is precisely this illicit positing of the person as being something actual which leads—as Vaihinger has shown in relation to the other fictions—to all the"pseudo problems", the "artificially created difficulties", the "self created contradictions" which abound in the doctrine of the "legal" person just as they abound in all philosophical and scientific theories that gather around a fictitious concept.[21]

[17] Ibid. 173.

[18] Ibid 297.

[19] Ibid 197.

[20] Ibid 230.

[21] 'A solution of the so-called ultimate puzzle of the world will never be found, since that which seems puzzling to us, is the contradictions created by us, which emerge from the playful engagement with the mere forms and shells of cognition': Ibid 52.

At least here, however, a "correction" has to step in, and this correction can happen in no way other than by a reduction of the concept of the person to its natural boundaries, by means of a self-reflection of legal science, by means of a clarification of its logical structure. If one had not demanded from the legal concept of the person more than it can in its essence provide, then one could have been spared the entirely fruitless discussion which has developed around the person, and in particular around the concept of the "legal" person; then the downright naive and paradox blunders of juridic theory and the excesses of an organic theory could have been avoided, blunders and excesses which can only be explained by reference to the delusive power of fictions, which also mislead scientific thought, and which lost itself in juristic mysticism.

1.3 II

What needs to be clearly distinguished from the fictions of legal theory are the so-called "fictiones juris", the fictions of legal *practice*, i.e. of the *legislator* and of the *application of the law*. Now, as firstly concerns the "fictions" employed by the legislator, the fictions *within* the legal order, it must be stressed that these do not constitute "fictions" in Vaihinger's sense. After all, the positing of a norm, the legislative activity, is not a process of thought, and does not have *cognition* as its goal. It is rather an act of will, if indeed we want to see it as a process or a procedure at all. The legal order is expressed in words and these words undoubtedly often display the grammatical form which normally is found behind *epistemological* fictions: the"As-If". However, due to the lack of any aim of cognition within the legal order—which as such is the object of cognition, and not itself cognition or an expression of cognition—the words of a legal norm can never contain a "fiction" in Vaihinger's sense.

Let us immediately have a look at the example Vaihinger uses in his chapter on "juridic fictions": article 347 of the German Commercial Code "where it is stipulated that a good which is not in time returned to the sender has to be treated *as if* it had been approved and accepted by the receiver."[22] In this example we are supposed to immediately see the identity in principle between the analogous fictions, e.g. the categories, and the juridical fictions. However, in the categories, just as in all true fictions, the human intellect aims to comprehend actuality or some other object. In the fiction of Article 347, however, neither actuality nor anything else is intended to be *comprehended*, it should rather be *regulated*, a norm of *action* is given, i.e. an actuality is supposed to be *created*. Of course, there is a deep connection between the intellect which *orders* the world by employing categories and which thus creates the world as ordered unity, on the hand, and the law that regulates and thus creates the legal word, on the other. However, the difference of principle between the epistemological and juridic fiction of the legislator shows in

[22] Ibid 46 ff.

the fact that in the latter case there can never be found an opposition to actuality, be it to the actuality of nature, or be it to the actuality of law (i.e. of the law as an object of cognition). Such a contradiction could only be found in a statement about what is (and if one wants to accept the extended concept of a fiction here proposed: about that what ought to be). However, the law cannot include such a statement. In a law no *cognition* is expressed. The statements in which the law expresses itself are not statements in this sense. Article 347 by no means states that the goods not returned in time to the sender are actually approved and accepted. It simply states that in case goods are not returned in time the same norm applies as in the case the goods are accepted; it states that in this case the sender and the receiver have the same duties and the same rights as in the case of actual acceptance. Article 347 stipulates that goods not returned in time have to be treated *just as* goods which are accepted. The grammatical form of the "As-If" thus is not in any way essential, it can be replaced by a mere "just as". If the law subsumes two cases under the same norm, it by no means claims that both cases are alike—in the sense of *naturally* alike. Or otherwise every general norm would be "fiction" since there are no two men, two facts which are alike. However, "legally" they are effectively, actually and truly alike, since they are made alike by the legal order. Article 347 is, just like any so-called "fiction" of the legislator, nothing but an abbreviating expression. The law simply wants to attach the same legal consequences to one case as it does to another. To phrase this in a separate norm would be too cumbersome, too laboured; or maybe the second case was not even considered in the first place. It would be superfluous to repeat all the rules which have already been set down for the first case. The legislator can rest content with declaring that in the second case the same rules apply as in the first case. It is a misunderstanding to suppose that this effect would be achieved by forcing the person applying the law to accept the idea that both cases are alike, i.e. that they do not differ as a matter of fact. That they are "legally" the same simply means that despite a natural *difference* in fact the *same* legal consequence is supposed to follow. And this difference of fact can by no means be ignored in applying the law. The judge first has to *establish* the facts; he has to establish whether the goods were accepted *or whether* they were not returned in time. If the recipient claims: I have not accepted the goods, then it has to be established that he did not return them in time. Where do we here find the opposition to reality?

In the context of distinguishing between the fictio juris (the fiction of the legislator) from the praesumptio, Vaihinger defines the juridic fiction as follows: "In the praesumptio a presumption is made *until the opposite is established*. By contrast, the fiction is the assumption of a statement, of *a fact, even though the opposite is certain*." He uses the following example: "If a man, whose wife commits adultery, nevertheless is treated as the father of the child born from this adulterous relation when in fact he was actually in the country at the time of the conception, then he is treated *as if* he were the father, even though he is not the father and even though everyone knows he is not. This last sentence distinguishes the praesumptio

from the fictio."[23] However, even though it is quite correct to insist on a distinction between the fictio and praesumptio, the fictio is not accurately captured here. The law does not claim that under certain conditions the husband is the *father*, i.e. the natural father, the *progenitor* of a child which has been conceived in an adulterous relation. The law does not make any such claim; it does not assume a matter of fact, even though the opposite is certain. Rather it only regulates for certain reasons and to certain ends, that under certain circumstances the husband has *the same* duties and rights in relation to a child which was conceived by his wife in an adulterous relation and that this child has *the same* duties and rights in relation to this husband as they exist between the husband and his own children which were conceived in wedlock. Now if the law uses the phrase, that the husband under given circumstances is treated "as father" of the illegitimate child, that he is to be treated "as if" he was the legitimate father, then this is nothing but the abbreviated formulation of a legal norm. No opposition to actuality is therein in any way posited. After all, one can, without committing such a contradiction to reality, even claim in terms of legal theory that the husband *is* the father in a legal sense, that he is the "legal" "father" of the illegitimate child, as long as by means of the term "father" one constructs a specific legal concept, i.e. the subject of particular duties and rights, *personification of a particular complex of norms*. A fiction in the sense of a contradiction to actuality would only emerge if one identified this legal notion of a "father" with the*natural object* of the male *progenitor* who bears the same name. Such a fiction, however, would be *plainly* mistaken, harmful and completely unnecessary. It would be the same fiction as the one characterised above in the hypostatisation of the legal person into the natural fact of *man*, or the "real" organism. And in this case it would be a fiction of legal theory, i.e. of an activity directed at the *cognition* of the law, and not of the legislators, whose activity is directed at the *creation* of the law.

One of the greatest achievements of Vaihinger's analysis is the insight into the deep relation between the mathematical method and the conceptual technique of legal science.[24] However, the complete identification of in particular the *legislative* fiction with the fictions of mathematics surely is mistaken. "The similarity of method of both sciences is not limited to their basic concepts, which in both fields are of purely fictitious nature, but equally shows in their entire methodological procedures. As concerns the latter, what we have to deal with in both fields most of the time is to subsume a singular case under a universal, the determinations of which should only be applied to this singular. However, the singular resists this subsumption. For the universal is not comprehensive enough to comprehend the singular under itself. In mathematics we have to deal, for instance, with the case of having to subsume warped lines under the straight ones; after all, this has the great advantage of allowing us to make computations with them. In legal science we want to bring the single case under a law in order to apply the benefits and criminal sanctions of the latter to the former. Now, in both cases a *relation, which in actually does not*

[23] Ibid 258.

[24] Ibid 80, 251, 69 ff, 187.

pertain is seen to pertain: thus, for instance, the warped line is taken to be straight and the adoptive son is taken to be the actual son. A warped line never is straight and an adoptive son never is an actual son; or, to take another example: the circle should be conceived of as an ellipse; in legal science the defendant who does not show up in court, is treated *as if* he submitted to the charge, and in case of demerit the appointed heir is treated *as if* he had died before the deceased testator." [25] However, Vaihinger seems to overlook the fundamental difference between the thought processes of mathematics and the formulations of the legislator: it is true, in both cases we want to subsume a single case under a universal norm or concept, where, however, the norm or concept is not universal, not broad enough to capture the single case in question. But what does the legislator do? He simply *broadens* the norm, he extends it to the new case—and he does so without any fiction, without any contradiction to actuality. The new case relates to the extended norm in no way differently than any other case relates to the norm regulating it. The intended relation *is* established; within the field of law this relation it is *not* a relation which "*cannot in actual reality* be established", but it is effectively established in the "actuality" of the law. In contrast, mathematics claims that the circle is an ellipse and that the warped line is straight and thereby sets an opposition to reality. However, the law does *not* claim—after all it does not claim anything—that the adoptive son is an actual son, that the defendant who does not show up has actually submitted to the charge, or that the unworthy heir died before the testator. It only "claims", i.e. it posits—and this positing stands in opposition *to nothing*—that the same norms apply to the adoptive son as apply to the actual son—just as it posits that certain norms apply to men and women alike irrespective of their gender difference—and it posits, that the failure of the defendant to appear in front of a court has the same legal consequences as the acceptance of the claim, etc.

Similarly, no true fiction can be found in the principle of English law, which Vaihinger uses as an example of a fiction: the king can do no wrong.[26] The king "truly" can do no wrong insofar as the legal norm withdraws its validity in relation to him. After all, "wrong" is no natural fact. A "wrong" is a matter of fact only in its relation to a legal norm, only by means of the fact that it is included as content in a prescriptive norm, or as a condition in a legal norm that prescribes punishment or a sanction. Insofar as the legal order does not forbid acts or omissions of the king, insofar as it does not make them conditions of punishment or a sanction, *there is* no wrong of the king. The principle of Austrian and German law, which is analogous to the English principle, i.e. the monarch is immune, simply creates the legal fact, to which alone a legal fiction could stand in opposition. The *mistaken view*, that a wrong would be a natural fact, that murder was a legal wrong, even when it were not forbidden by law or threatened by a sanction, creates the opinion that the mentioned legal principles, which only limit the applicability of the legal order in certain ways, are fictions because they could come into contradiction with actuality.

[25] Ibid 70.

[26] Ibid 697.

It seems that Vaihinger did actually have a sense of the difference between the "fictions" of the legislator and the mathematical fictions. He obfuscated this difference for himself by first correctly juxtaposing legal *science* and mathematical cognition, then, however, by dealing with constructs of the *legislator* and not of legal science. He states: "It is, however, much easier for legal science to deal with its fictions than it is for mathematics: in the case of legal science actual facts stand in opposition to arbitrary legal rules; thus, a transformation is quite easy. One simply has to think that the matter were as such." However, here we do not have to deal with a "transformation" at all; the legislator—and with him everyone applying the law—does not"think" that the matter were as such, he rather *decrees* whatever he wishes. This is how the "matters" become actually, i.e. legally, as they are. Within his realm, the legislator is almighty, since his function rests in nothing but his ability to tie certain legal consequences to legal conditions. A fiction of the legislator would thus be as impossible as a fiction of nature itself. After all, the law could only be opposed to itself—i.e. to its own reality. This, however, would be nonsensical.

The opposition which is posited in the fictions of legal science (which have to be distinguished from "fictions" which are mere abbreviations within legal parlance) can occur only in relation to the legal order, to the law as the object and thus to what counts as the "actuality" of legal science. As soon as it is translated into an actual statement, the construct created by legal science, i.e. the ancillary concept, has to imply a claim which stands in opposition to the legal order, which cannot be deduced from the legal order. Such a case has been exemplified above in the concept of the person. Such a contradiction to the legal order is, of course, impossible in the case of the fictions of the legislator, it is only a superficial semblance created by mere use of certain words.

We can see from the following example of the praetorian fiction of Roman Law that Vaihinger himself actually had the opposition to the legal order in mind when he spoke of juridic fictions. He quotes Pauly's *Realenzyklopädie des klassischen Altertums,* III, p. 473: "The Romans called fictio a *facilitation of the circumvention of the law* allowed by praetorian law, which consisted in the license that under certain circumstances some condition demanded by strict law can be considered to be fulfilled, even though it has not actually been fulfilled. Thereby certain legal consequences ensue, even though the conditioning facts have not occurred in the way demanded by the law". Vaihinger comments as follows: "This explanation mutatis mutandis *neatly* fits the *scientific* fiction in the narrower sense; here, too, a facilitation and circumvention of difficulties takes place, which here, too, is a consequence of the very complex state of affairs: here, too, the demands of the *strict laws* of logic are circumvented, here, too, consequences and practical conclusions occur, which are *correct*, despite that which is presupposed is itself *incorrect*."However, neither Pauly's description of the "fictio", nor Vaihinger's conclusions drawn from it are entirely correct. The conclusions drawn depend on the claim that the Praetorian fiction is a "circumvention of law", and that it posits an opposition to what the law demands. However, this is not the case, as the Praetor himself is a legislative organ, since he—by means of *constitutional* law—does not only apply the law, but he creates it. Now, if the Praetor allows a peregrinus to institute legal proceedings

which according to the ius strictum only a civis can do *as if* he were a civis, this means nothing but the following: a *legal* norm has been posited, in which certain rights and duties of the civis are extended to the peregrinus and this legal norm can be formulated without any reference to an 'As-If' and without any fiction: the peregrinus is allowed to levy the claim just as the civis is. The "consequences and practical conclusions" which here occur, are not "correct", *despite* the conditions being incorrect, but only *because* the conditions, too, are "correct", i.e. lawful, and are in line with the new legal rule created by the Praetor. The mistake made here is to take the strict ius civile as the only element of the legal order, just as if the Praetorian law—as fully valid, objective law—were not part of it. The right to institute an action by the peregrinus cannot contradict the legal order, since it itself rests on one of its rules! However, at least one fiction can be uncovered here: the fiction that the Praetor does not *make* law, but that he only *applies* the law. As someone merely applying the jus civile the Praetor, in granting the peregrinus the right to institute an action which only the civis has, would set a contradiction to the legal order which consisted entirely in the jus civile. And this contradiction which occurs in the *application of law* would have to hide beneath a fiction. This fiction, however, does not consist in the claim that the peregrinus actually is a civis, but in the claim that the legal order also grants the right to institute an action to the peregrinus. The Praetor in no way denies the difference between the civis and the peregrinus in general. He only denies it—insofar as he presents himself as someone applying the law—in terms of standing, i.e. he claims: the peregrinus, too, has standing. However, this fiction becomes superfluous, nay, impossible, in the very moment that the other fiction falls away, the fiction that treats the Praetor as someone merely applying the law and not as a delegated legislator.

1.4 III

From what has been said so far it should emerge that as concerns the possibility of a fiction—which depends on the possibility of a contradiction to the legal order—the application of the law differs from legislation. In relation to the legal norms someone applying the law actually does face a situation very much like the one mathematics faces in relation to concepts like circles, ellipses, the warped or straight line, etc. The judge, the businessman, cannot arbitrarily extend and restrict the legal norms, in other words: they cannot tie arbitrary legal consequences to arbitrary legal conditions. If one wishes to subsume a certain case under a norm, which does not capture this case, then a fiction may seem expedient: to treat the case *as if* it fell under the legal norm. If the law threatens a sanction for the damaging of a public telegraph, but leaves a similar damaging of a public telephone without threat of sanction, or if it threatens the delict with—in the view of the person or organ applying the law—too mild a sanction, then it is a fiction if the judge applies to someone who damages a public telephone a sanction, which the law had intended only for someone damaging a public telegraph, in that he uses the norm intended

to protect the telegraph to protect the telephone; the judge here does not proceed *as if* the telegraph were a telephone, this is not what the judge claims and wants to claim, but he proceeds as if the law threatened the same sanction to a damaging of a telephone as it does to the damaging of a telegraph. The juridic fiction can only involve a fictitious *legal* claim, and not a fictitious *actual* claim. After all, the judge has to explicitly determine the facts and must not ignore that a *telephone* and not a telegraph was damaged. His claim, which stands in opposition to the *legal* order and not to actual reality, is: the public telephone, too, *must* not be damaged. Claiming the validity of an—invalid—general norm is the means by which he reaches the correct judgement, at least the one intended by him. It is not the claim that a telephone is a telegraph.

The fact that the application of the law can include legal fictions, derives from the fact, that it itself presupposes legal *cognition*, or, put more correctly, that the compound act of legal application includes an element of legal *cognition*. However, it has to remain doubtful whether these fictions of the application of the law—which are identical with the cases of interpretation by means of *analogy*—are similar to the epistemological fictions in the sense that the latter reach a *correct* conclusion—and be it by means of an explicitly incorrect idea. After all, the "correctness" of legal application can only mean *legality*, and not utility. The fiction that the warped line is a straight line is a mathematically correct result. It would have to be a legally correct, i.e. a lawful result which is reached by means of the analogous-fictitious interpretation. Now, the legality of this result can only be measured against the legal order itself; however, the *contradiction* to the legal order in the case of a fictitious-analogous application of law is not merely a provisional, correctible one, but a definite one, one which cannot be corrected in due course. Now, Vaihinger claims as a central feature of the fiction, "that these (fictitious) concepts either historically become obsolete or logically fall away." "Insofar as we deal with an opposition to actual reality, a fiction can only be of value as long as it is employed provisionally …" And he says particularly about semi-fictions: "That is why … a *correction* has to step in; since without such a correction they would not be applicable to the actual world. [27] Of the juridic fictions, however, he claims that such a correction is not necessary. After all, in this case we do not deal with the exact estimation of actual reality, but with the subsumption under an arbitrary law, a human artifact, not a natural law, not a natural relation.[28] However, it is thereby by no means established that the correction of juridic fictions in case of the *application of the law* is superfluous! For the intellectual activity that makes use of the juridic fiction (fictions of legislation as well as the fictions of the application of law) cannot be seen to be an estimation of *actual reality.* This, however, can only have the consequence that there is no need for an opposition to actual reality and for an epistemological fiction in Vaihinger's sense. Insofar as epistemological fictions are possible as "juridic" fictions, they can only be fictions of the cognition of the law. And for them the contradiction, which constitutes the essence of a fiction, relates to the legal order, which is the

[27] Ibid 172/73.

[28] Ibid 197.

"actual reality", the object of cognition of legal science. *This kind* of contradiction, however, is just as much and just for the same reasons in need of correction, as the *analogous* contradiction in the case of physical, mathematical or otherwise (in the broader sense) scientific fictions, since without such a correction the juridic fiction would be just as inapplicable to the legal order, i.e. to the actuality of juridic cognition, as the other fictions would be inapplicable to nature. The fictions of the *application of law*—i.e. the analogical interpretation—, conversely, sets an *irresolvable* opposition to the legal order. It is not a detour, which in the end leads us to the "actuality" of the law, but an error, which might lead to what the feigning actor thinks helpful and expedient, but which never leads to the object of legal science: *the law*. For this very reason, the *justification* of this kind of juridic fiction, i.e. the fiction of the application of law, has to be seen to be theoretically impossible. This needs to be expressly stressed since Vaihinger wants to include in particular these juridic fictions as *equal* and *equivalent* phenomena into his system and his theory of fictions, which, after all, by and large intends to be an apology of fictions.

However, what needs to be considered is that in fact such an inadmissible fiction *only* occurs, as soon as an undeniable and irresolvable opposition to the legal order is posited. This is *not* the case in all of those instances of analogical applications of law where the legal order allows for, indeed under certain circumstances requires, an analogy. Now, whether this is expressly stipulated in a legal norm, like, for instance, in Article 7 of the Austrian Civil Code, or whether one relies only on a norm of customary law or—in the cases in which one does not rest one's claim on positive law—on a natural principle of law, does not matter, since an opposition to the legal order—and thus a fiction—is impossible as soon as the legal order itself allows for the application of the analogy and thus also demands the decision reached by means of the analogy. One should not forget that no jurist, who declares the analogy to be admissible, will ever decline to let the decision reached by analogous interpretation be called *law*. This, however, means: the statement, which demands the analogy, has to be claimed to be a *legal norm*. The establishment of the existence of such a legal norm is, of course, an entirely different matter. In the light of legal theory a fiction of the legislator is thus impossible, a fiction of someone applying the law is completely inadmissible, since it is *in violation of the purpose of the law*.

1.5 IV

In order to demonstrate that the fictions of the application of the law do not belong within Vaihinger's system of fictions, it needs to be stated, that *cognition* of law—which alone can lead to a fiction in the true sense of the term—only plays a subordinate role in the application of law. It is not the essence, the actual purpose of this activity, but only the means by which it reaches its goal. The application of law, just as the creation of law, does not really intend the cognition of law, but its realisation, it is about *acts of the will*. The cognition of law, the *theory* of law, only prepares the practice of the law, it creates the tools for the latter.

Now, Vaihinger may himself have made a distinction between legal *theory* and legal *practice*.[29] However, he overlooked the principled difference between the truly epistemological fictions of legal *science* and the pseudo-fictions of legal practice. What is more, Vaihinger nearly exclusively concerned himself with the so-called "fictions" of legal practice. Still, at least some fictions of legal theory can be found in his work. Unfortunately, they are most of the time only sketched out by a catchword and presented without further analysis. He especially missed out on an analysis of the legal person in general and of the legal person of the state in particular.[30] The fictions of "freedom" and of the "social contract" establishing the state, which Vaihinger also deems necessary for the establishment of public criminal law, are not fictions of legal theory, but ethical fictions. The "right" of the state, to punish, demands a moral, and not a juridic justification; and the freedom of the will as a foundation of this right is by no means a *necessary* ethical fiction. Since the principle of general prevention or deterrence, too, which Vaihinger mentions, is a justification of punishment, which rightfully exists without any fiction of freedom. The "fiction" of freedom only emerges when one mistakenly applies a normative category to the—causally determined—natural reality, when one illicitly and syncretistically combines an is with an ought, a syncretism which, at least for the sake of juridic cognition, is certainly superfluous. One acts or is going to act in a certain way (consideration of is), only if one *can* act in this way, or if one *must* act in this way. The statement which declares that a certain act actually *will happen* (in the future), even though this act has been seen to be impossible, posits a contradiction to the object it tries to capture in the statement: to actual reality; it is thus inadmissible and worthless. However, the statement: someone *ought* to act in a certain way, never posits a contradiction—be it to actual reality, or to any other object of cognition—not even in the case in which the action, which ought to be performed, appears to be impossible. Only if one ignores the difference between is and ought (as two distinct forms of cognitions) and takes the *possibility of being actual* as a conditions of an ought-statement, only then the illusion is created that there existed a contradiction between the statement, which posits that something *ought to be*, and the statement, which claims as a *matter of fact* that this something is actually impossible; only then the following error emerges: that a certain content (the action which ought to occur) has to be *actually* possible, the actor thus has to be *feigned to be free*, in order to make possible the statement of ought, and thereby to simultaneously make possible the duty to act and maybe even the duty to act differently than one actually acts, differently than one actually must or can act. A methodological error leads to the fiction of freedom, which becomes superfluous as soon as one acknowledges this error. This is the only way to explain the curious fact that a strict opposition between the freedom within ethics and jurisprudence, on the one hand, and the un-freedom within natural science, on the other, could emerge, yet could at the same time be ignored by both sides. The ethical fiction of freedom thus is useful and necessary only as long as the adequate methodological insight is absent. And it

[29] Ibid 257.

[30] Ibid 259.

is in this way that Vaihinger's second main characteristic of the fiction must seem so very fitting: "If there is a contradiction to actual reality, the fiction can only be of value if it is used provisionally. Until experience is enriched, or until the methods of thought are sufficiently sharpened, to be able to replace these provisional methods with definite ones."[31]

Vaihinger does not capture the fiction of the social contract establishing the state correctly, when he claims: "The state does not want to base its coercive law on mere might, not even on purely utilitarian grounds, but it wants to establish it as true right: this, however, is possible only by means of the fiction of a contract: after all, the jurist knows of no other rights than those emerging from contracts." However, the fiction of the social contract establishing the state, just as the fiction of freedom, does not actually serve the *juridic* justification of the coercive functions of the state. After all, such a juridic justification contains nothing but the fact that something is derived from a juridic norm. However, what is demanded here is the justification of the legal norm, i.e. of the norm which orders the infliction of coercion itself. This justification is effected by means of a higher, extra-legal norm: the moral or "natural" fundamental principle: pacta sunt sevanda. *This is the reason why* the contract has to be feigned, and not because the jurist allegedly knows no other law than that which emerges from contract. Moreover, the latter statement is factually mistaken. The contract is but one of many matters of facts, to which the legal order attaches rights and duties.

The social contract establishing the state thus is in fact no fiction of legal theory, but an ethical fiction, a fiction of a moral world-view. A jurisprudential perspective has to drop precisely such a fiction and the imagination of an ethical justification of the law.

1.6 V

After all, legal science—as cognition of a particular object—can only be possible if one assumes the *sovereignty of the law* (or, which is the same, of the state), i.e. if one takes the legal order as an independent system of norms which is not dependent on any higher order. Otherwise only a moral science (ethics) or theology would be possible, depending on whether one takes the law to be a result of morality or religion. (As long as we consider the law to be an order, a complex of norms, we do not need to consider here a possible natural science or sociology of law, which clearly would also have to be considered a science of law). Now, Vaihinger thinks that a fiction lies precisely in this separation of law from morals. The als. The "fictitious isolation", that occurs in the positivistic view (i.e. in a view which presumes the law to be an independent, sovereign order), was "the provisional departure from an integrated part of reality."[32] Vaihinger thinks that for the legislator and jurist the separation

[31] Ibid 17.

[32] Ibid 375.

of law and morality as two distinct realms might be of high value, however, one should not forget, that here the "in fact" had to be replaced by an "as-if". "Since, however one wants to determine the relation of these two very important areas of life, one can hardly reach the conclusion that these two, as a matter of fact, have no relation to each other whatsoever. This comment is of particular importance, as due to a lack of methodological insight jurists regularly take this fiction to be an actual relation, which is a disastrous error. The one-sided approach can do many a good service to legal science and the practical life of the law, however, at a certain point the abstraction, which has been provisionally made, always needs to be replaced with full actual reality being reinstated."[33] However, this view cannot—especially not from the point of view of Vaihinger's own theory of fictions—be agreed with. After all, the claim that the law was a system of norms which is independent from morality, which in its normative validity is not reducible to an ethical order, can for the very reason not be a "provisional" departure from an integrated part of reality, as nether law nor morality—both being considered as complexes of norms—are part of the realm of that actuality, which for Vaihinger is the benchmark from which the fiction departs, and which is identical with nature, with the world of the senses, and as neither legal science nor ethics try to capture this actuality in their objects. The relation of law and morality is in no sense a relation between two "realms of life" as two parts of *natural* reality. Their "actual" relation is no relation in actuality, i.e. in reality which can be captured by natural science understood in the broadest sense and also including social sciences. The juridic perspective which Vaihinger accuses of committing a fictitious isolation, cannot depart from an integrated part of actuality, not even in determining the relation of its object to morality, since it does not even have actuality in view. However, insofar as law and morality are considered as—social—facts, as "actual" going-ons in nature (and it remains an open question whether this is at all possible), they are not objects of specific juridic cognition, or of normative ethics. And in this sense the related fictitious isolation cannot take place at all. There is no need for it at all. For an inquiry of the actuality of the so-called experience of law, of the factual moral ideas and the "moral" actions effected by them—its methodological possibility simply assumed—law and morality are something completely different than what these two same words denote as objects of normative legal science and ethics. And for an act of cognition aiming at actual psychological facts and actions there can be no fundamental difference between an actuality called "law" and an actuality called "morality", and certainly no expediency of a fictitious isolation of both, and be it only a provisional one. Vis-a-vis a juridic perspective such a "full actual reality" can never be "given back its rights".

Now, for Vaihinger the representation of a legal order—as a complex of norms of ought—just as the representation of a moral order appears as a fiction. According to him concepts like norm, duty, the ideal etc. have to be subsumed under the class of practical fictions.[34] Now, even though Vaihinger does not extensively engage with the concept of a legal norm, of the legal ought and of the legal duty, etc. it should

[33] Ibid 375.

[34] Ibid 59 ff.

be assumed that we can say the same about them as we can say about the ethical concepts, which Vaihinger all expresses as fictions. Thus, one could say with Vaihinger: the jurist treats the law, *as if* it were a sum of ought-norms. However, *if* this is a fiction, if the law *in actuality* is not an ought-norm, what *is* the law "in actuality"? And moreover: What *is* an ought-norm? Put differently: if the assumption that the law as an ought-norm is a fiction, then the law needs to be able to be something else, something "actual", and then the "ought-norm" has to be something "actual"; however, it has to be something else than the law "actually is" and the ought-norm must not itself in turn be a fiction. Since the fiction obviously consists in a likening, i.e. in the erroneous identification of something actual with something else which is actual. To put it in the formula of a fiction: X is treated, *as if* it were Y (even though X is not Y); this means, however, that both X and Y have to be actual, or they have to be claimed to be actual. It is not their existence but only the identification which is fictitious. In Vaihinger the formula of fiction is the following: "In this formula it is stated, that some given actual entity, some particular thing was *likened* to something else, the impossibility or non-reality of which is at the same time claimed … e.g. in the juridic fiction the formula is as follows: this heir is is to be treated as he would have been treated had he died before his father, the bequeather, i.e. he is to be disinherited"What is relevant in this context is only the insight that both elements, the "heir" and "the one having died before the bequeather" in and for themselves, i.e. irrespective of their position in the relationship of the fiction, are something *actual*. Vaihinger continues: "What is expressed here is, first and foremost, a *likening*, i.e. the invitation to perform a likening or a subsumption; such a statement initially claims nothing else but the following: man is to be considered as a gorilla. But why should he be considered as such? Simply because he is like a gorilla. All other cases are like this one: we are invited to liken something to something else, however, together with this invitation we are also made aware that the likening rests on an *impossible condition*; however, instead of declining to undertake the likening, it is nevertheless still performed, albeit for other reasons.[35] The fiction consists in the likening of two actualities, despite the impossibility of this likening.

However, the law from the very beginning is nothing actual. There is no part of natural reality which can be called law. And even if one wanted to disregard this fact, and wanted to still consider the law, *as if* it were an ought-norm, the question emerges, what an ought-norm actually *is*? Well, nothing actual, but itself a fiction. And the fiction here does not only consist in the 'as-if' formula, but also in that, to which the law is likened by means of a fiction. The fiction, the fictitious statement, claims—in the statement which starts with the as if—the actuality of something (and be it in opposition to the latter). The analysis of every fiction has to lead to certain elements of actual reality, which may be erroneously connected, but still exist; the fiction has to be resolvable, or otherwise it hovers in mid air.

Thus it has to appear as if the characteristics of the concepts of a fiction, which Vaihinger himself established, do not really fit his "practical fictions". Basically, Vaihinger had to declare *all* ethical concepts to be fictions. He does so explicitly as

[35] Ibid 164/65.

concerns the concepts of the ethical world order, of duty, the ideal and some others. However, in the case of all these concepts precisely that element, which according to Vaihinger is essential to the fictions, is missing: the contradiction to actual reality. After all, a contradiction to actual reality can only exist, when something actual is claimed, when something actual is at all to be known. Vaihinger states: "The ideal is a conceptual construct which is both inherently contradictory and stands in contradiction with actual reality, which, however, has tremendous, world-transcending value. The ideal is a practical fiction."[36] This could be said of any ethical or juridic concept, since it can be said of the concept of the *ought*, which is identical with the *formal* concept of the ideal. However, where can we find the contradiction with actual reality in any ought-statement, even in one which has something actually impossible as its content? The statement which expresses an ideal, a duty, an ethical demand: e.g. X ought to be charitable, and the statement describing actual reality: e.g. X is not charitable, are not contradicting each other in any way. Even if one concedes—and one has to concede this—that everything which happens, *has to* happen as it happens, and *cannot* happen otherwise, so that any ought which has a different content than the is would demand something *impossible*, no contradiction between is and ought would be present. The fact of *a* is only contradicted by the fact of *non-a* and not by the ought of *non-a*. Unless one wanted to resolve the ought-statement into an as-if-statement and claimed that in saying that *a* ought to be, I act as if *a* were the case; and if I claim: X ought to be charitable, I feign X (in thought) as actually being charitable, even though in reality he is not charitable. Ought would then be a feigned is. However, this view is obviously incorrect. In the representation of ought we make use of a form completely different from the representation of an is, a form which can take any arbitrary content without getting into logical opposition to any representation of an is, which has an opposing content. Rather than calling the ought a feigned is, I could, with the same legitimacy, call the is a feigned ought. This is why a normative concept can be inherently contradictory, however it cannot possibly contradict reality. After all, normative cognition is not directed at actual reality at all. Of course, within normative cognition fictions can very well exist, i.e. concepts can exist that are opposed to the specific object of cognition. However, this object of cognition itself and the entire activity of cognition cannot be called fictions. The concepts "god and conscience" may be fictions. The "ought", the "duty" and the "norm" certainly cannot. This is clearly shown, as soon as one tries to present the "fiction" of a duty in an "as if" statement: we ought to act as if it were our duty to act in a certain way. However, already in the first clause: we ought to act, we find included the assertion of a duty. The statement would thus be: we are *under a duty* to act as if we were under a duty. Duty and ought are identical. However, does the statement: we ought to act in a certain way, have the meaning of a fiction? It would indeed have such a meaning if we were to claim: we act in such a way, even though we do *not* act in such a way. However, precisely this assertion is not involved, but rather the following: we *ought to* act in such a way, even though maybe we do not act in such a way.

[36] Ibid 67.

It is an entirely different question, whether and how the claims expressed in ought-statements can be demonstrated or proven, whether not every system of norms was ultimately based on a basic ought statement which is not provable. This can be conceded without thereby conceding the character of a *fiction*, i.e. of a contradiction to actuality (as natural reality).

The concept of the ought—and with it the concepts of a duty, of a norm, of the ideal, of (objective) value—could be called fictions, would we not by a fiction understand a construct which serves the cognition of actual reality, and at the same time posits a *contradiction* to precisely this actual reality. And ought statements—the ethical just as the legal—are "fictions" only if by a fiction we understand everything which is not the expression, and particularly a consistent expression, of *natural* reality. So, even if we can concede to Vaihinger that legal norms—just as the entire world of the ought—are imaginative products of the human mind, phantasy constructs which have to be contrasted from the empirical world of the natural being,[37] a contradiction to this actuality, which is the first of his "basic features", by which one can "immediately detect every fiction",[38] by no means becomes necessary. It is precisely in the category of the ought that a form is being created, in which the phantasy can unfold without any contradiction to actual reality. On the other hand the world of the ought has to count as an object of (ethical and juridic) cognition, as its own variety of actual reality, which, albeit different from, must nevertheless be seen as equal with, natural reality, if there is to be a *true* fiction.

Vaihinger has thus illustrated his brilliant theory by precisely those juridic fictions (i.e. those of legislation and application of the law), the discovery of the nature and cognitive value of which on closer inspection cannot be seen to be his greatest merit. On the other hand, legal science knows of other, by all means analogous auxiliary concepts. However, it is not legal science which sheds a light on those fictions—as Vaihinger thinks—but vice versa: the true, theoretical fictions of legal science become more comprehensible only through the fictions of mathematic and other sciences. The fictions of legal theory have nothing specifically juridical to them at all, they do not constitute a method characteristic to legal science.

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[37] Ibid 70.

[38] Ibid 171 ff.

Chapter 1: Author Query

AQ1. Please note that both author names have been kept for this chapter ("original work" and "translated by"). Please confirm.